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SUPPIAH PAKRIASAMY

v.

S BALARAJAH & ORS (NO 2)

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HIGH COURT MALAYA, JOHOR BHARU
ABD HALIM AMAN J
[ORIGINATING SUMMONS NO: 24M-214-2010]
31 JANUARY 2011

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CIVIL PROCEDURE: *Action - Mode of commencement - Removal of Chairman of State Bar - Originating summons to challenge legality of resolution passed at EGM - Whether in the nature of public law remedy - Whether action to be commenced by way of judicial review - Rules of the High Court 1980, O. 53 - Legal Profession Act 1976,*

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ss. 41(2), 56, 57, 70(5), (8)

LEGAL PROFESSION: *State Bar - Office bearers - Extraordinary General Meeting - Removal of Chairman - Originating summons to challenge legality of resolution passed at EGM - Summons directed at individual members of State Bar - Whether in the nature of public law*

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remedy - Proper mode of action - Whether to be begun by way of judicial review - Legal Profession Act 1976, ss. 41(2), 56, 57, 70(5), (8) - Rules of the High Court 1980, O. 53

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The plaintiff, the Chairman of the Johore Bar Committee ('JBC'), was removed from his position pursuant to a resolution passed at an Extraordinary General Meeting ('EGM') of the JBC requisitioned by the defendants. Dissatisfied, and alleging that his removal was unlawful and *ultra vires* the Legal Profession Act 1976, the plaintiff filed an originating summons and applied for

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declaratory orders against the defendants. At the hearing, upon the authority *inter alia* of *Ahmad Jefri Mohd Jefri v. Pengarah Kebudayaan & Kesenian Johor & Ors* ('*Ahmad Jefri*'s case'), a preliminary objection was however taken by the defendants, contending that the commencement of the action by way of

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originating summons was procedurally flawed, as the plaintiff, properly, ought to have invoked O. 53 Rules of the High Court 1980 ('RHC') and proceeded by way of judicial review. It was the thrust of the defendants' argument that the remedy sought for by the plaintiff was a public law remedy, since JBC is part of the

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Malaysian Bar Council ('MBC') and MBC in turn is a Public

Authority. The plaintiff maintained that the proceeding was not in the nature of public law proceeding, that nothing mattered on the non-recourse to O. 53 RHC and that, in any case, *Ahmad Jefri*'s case (in matters involving solely or predominantly public law, the plaintiff must proceed by way of judicial review) was distinguishable on the facts.

Held (dismissing objection; ordering adjudication of originating summons):

(1) No public personnel nor any public law nor any Public Authority are involved in the present originating summons. Looking at the list of the defendants named in the summons, it is clear that they are all individuals and private persons. MBC was not named as one of the defendants and was only present as an intervener. This being the case, the issue of whether or not MBC is a statutory body does not at all arise. (paras 11- 12)

(2) The plaintiff in this case was not challenging any Public Authority. What was being challenged was the resolution passed at the EGM on 26 November 2010 which led to his removal. Hence, unlike *Ahmad Jefri*'s case, where the sacking was done by a Public Authority, no element of public law could ever have existed in this case. The court, in the event, would agree with the plaintiff that the action may not commence by way of judicial review. (paras 8 & 11-12)

(3) Premised on the above reasoning, the preliminary objection is overruled, the plaintiff's originating summons remains and matters may be adjudicated further. (para 13)

Case(s) referred to:

Ahmad Ibrahim Bilal v. Ketua Polis Negara & Ors [2011] 1 CLJ 85 CA ***(refd)***

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2010] 5 CLJ 865 FC ***(refd)***

Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Majlis Peguam Malaysia & Ors v. Raja Segaran Krishnan & Other Appeals [2004] 4 CLJ 239 CA ***(refd)***

Robert Cheah Foong Chiew v. Lembaga Jurutera Malaysia [2009] 1 CLJ 192 CA ***(refd)***

Legislation referred to:
Legal Profession Act 1976, ss. 41(2), 56, 57, 70(5), (8)
Rules of the High Court 1980, O. 7, O. 15 r. 16, O. 53

For the plaintiff - Suppiah Pakriasamy (In person)
For the defendant - Tuan Hj Sulaiman Abdullah

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Abd Halim Aman J:

[1] At the outset of the trial when this case was fixed for hearing, leading counsel for the defendants raised a preliminary issue. The issue raised was pertaining to the mode of procedure being adopted by the plaintiff in initiating the matter. It was raised by Tuan Hj. Sulaiman in the form of a preliminary objection (PO). The gist of the objection raised was in regard to which procedure should be adopted by the plaintiff when filing this matter, namely, whether it should be by way of originating summons as chosen by the plaintiff here, or by way judicial review, a process stipulated under O. 53 Rules of the High Court 1980 (RHC).

[2] Upon mutual agreement from both parties, this preliminary and basic issue was agreed to be addressed first. As submitted by Tuan Hj. Sulaiman, the determination of which correct procedure to be followed would determine and dispose off the whole matter – should his PO is being accepted.

[3] I agreed with their suggestion that the PO needs to be addressed first, and hence this PO is being canvassed. Parties submitted orally. However, I gave liberty for parties to submit their further submissions based on some research, which submissions is to be completed by 27 January 2011. I am glad to state that both further submissions had reached me on the 26th, that is a day earlier.

[4] Tuan Haji Sulaiman, counsel for all the defendants, submitted that the crucial issue here is on the interpretation of s. 70(5) of the Legal Profession Act 1976 (LPA) which involved the Malaysian Bar Council (MBC) where Johore State Bar is part of the MBC. Quoting s. 41(2) of the LPA, he contended that the MBC is a Statutory Authority as defined under the Federal Constitution. Thus any challenge relating to the MBC on such

related matter such as elections and meetings, would render its proceedings to be proceedings of public law in nature. And, being proceedings under public law, it was contended that only public law should be canvassed – leaving the plaintiff with no alternative but to pursue under O. 53 RHC, namely for judicial review.

[5] Tuan Haji Sulaiman relied heavily on the recent Federal Court decision in *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors.* [2010] 5 CLJ 865 in which case the Federal Court echoed the analysis of the House of Lords in the case of *O'Reilly v. Mackman* [1982] 3 All ER 1124. It was stressed, through his supplementary submission, that in all matters that involve solely or predominantly public law, the mode of procedure to be followed would be for the plaintiff to proceed by way of judicial review under O. 53 RHC. Failure to do so, it was averred, will result in the action being struck off *in limine*. Further, the element of public law was said to be reflected in s. 70(8) of the LPA, as it required the State Bar Chairman to inform the Registrar of Court. Hence, it is said that the matter being pursued is one in the nature of public law. The second authority referred to by the defendant here is the decision of the Court of Appeal in the case of *Robert Cheah Foong Chiew v. Lembaga Jurutera Malaysia* [2009] 1 MLJ 676. In that case, it was held that since the remedy sought by the plaintiff was essentially a public law remedy, the failure of Robert Cheah to proceed under O. 53 RHC was held to be fatal. His originating summons was struck off by the High Court, a decision which was later upheld by the Court of Appeal. Counsel further submitted that *Robert Cheah*'s case is similar to the present case, which should therefore meet with the same fate.

[6] The other case of pertinent importance which was being referred to by the defendants was the very recent decision of the Court of Appeal in *Ahmad Ibrahim Bilal v. Ketua Polis Negara* [2011] 1 CLJ 85.

[7] In that case, a notice of motion seeking declaratory orders in relation to the applicant's extradition and deportation from Malaysia was filed. The Court of Appeal held that the application in effect was asking the court to scrutinise the action taken against him pursuant to various provisions under the Immigration Act 1959/1963 and the Extradition Act 1992; and that therefore it was an action that ought to have been commenced as a judicial review under O. 53 RHC.

[8] Mr. P. Suppiah, the plaintiff himself, appearing in person, submitted firstly on the failure on the part of the defendants to follow strictly Form 62 of the RHC, since no ground of the application was stated when they filed the application for striking out. It was submitted that a notice without the ground is incomplete. On the preliminary issue raised by the defendants here, he submitted that MBC is not a party hereof – and that it only concerned Johore State Bar. He touched a bit on the merit saying that there are no legal course under the LPA to remove the Chairman, the Committee and the Secretary and he submitted that this case should not go by way of judicial review. He also contended that the EGM is *ultra virus* the LPA. Referring to the decision in *Ahmad Jefri*'s case, he contended that the principle in that case is not applicable in the present situation, as there must be present public law elements, which the present case are lacking. He further submitted that the present case has nothing to do with dismissal, but only on declarations. MBC is not involved at all here as defendants. MBC, it is submitted, is not a statutory body, but only a body corporate, and so judicial review does not apply. *Ahmad Jefri*'s case is said to be distinguishable as it involved the dismissal of a public employee, whilst the case of *Robert Cheah* involved the livelihood of a professional. Through his further submission, he went on by detailing the similarities and dissimilarities between this case and that of *Ahmad Jefri*'s both from legal and factual perspectives. (Refer to paras (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15), (16), (17) and (18) of his submission). And, quoting a passage from the Malaysian Court Procedure, High Court 1 (2010) and a couple of passages under 53/1-14/12 Volume 1 of the White Book, he submitted that the scenario of the present case would see that no public personnel nor any public laws nor public authority are involved, as both the plaintiff and the defendants, coming as they were under the LPA, are private individuals. He even went to the extend of quoting the meaning of 'Public Law' as the term is defined in the *Oxford Dictionary Companion to Law* at p. 1013.

[9] Those are the gist of the submissions submitted before me.

[10] I notice that much reliance and emphasis was given to the recent Federal Court decision in *Ahmad Jefri*'s case. For that purpose it would be beneficial to reproduce the issues that were therein being posed for determination to the Federal Court. (These two issues were also being quoted by the plaintiff's counsel in his further submissions). The issues are:

(i) Whether pursuant to the amendment to O. 53 RHC *vide* gazette notification P.U (A) 342/2000 with effect from 22 September 2000, any application to challenge the decision of a Public Authority can only be commenced by way of a judicial review under O. 53 RHC; and

(ii) Whether it is an abuse of the process of the court to commence the proceedings by way of a writ and a statement of claim to challenge the decision of a public authority instead of filing a application for judicial review under O. 53 RHC thereby evading the clear requirement of O. 53 RHC. (Para (4) of p. 152).

[11] Looking at the issues, the core attention is focused on the term 'Public Authority', the principle of which shows that any challenge made against any decision from such 'Authority' is to be by way of 'judicial review' under O. 53 RHC. In brief, judicial review provides a means by which judicial control of administrative action is exercised. (Refer to the case of *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374). Premised on these questions, the pertinent issue that needs to be determined here is whether MBC is considered a statutory body created under Acts of Parliament – in particular the Legal Profession Act 1976. Is MBC to be considered a 'Public Authority' whose decision had infringed the rights of an individual who is entitled to claim protection under public law? In *Ahmad Jefri*'s case, it was held that the stringent conditions imposed by O. 53 of the RHC were intended to protect those entrusted with the enforcement of public duties against groundless harassment and to reduce delay in resolving applications in the interest of good administration. It is a well undisputed fact that what the plaintiff is seeking here is a form of declaratory relief. But in reality, as against whom is the plaintiff claiming? Looking at the list of the defendants named in the originating summons, they are all individuals. It is noticeable that MBC was not even named as one of the defendants. MBC was only present as an intervener in which it was mutually agreed to be made an intervener on 17 December 2010 after the originating summons had been processed and the matter was being 'case-managed' by the Deputy Registrar. In such situation, the issue for further determination, ie whether

A MBC is a statutory body or otherwise, just does not arise. Also, by referring to the intitulement to the originating summons, what was being stated beside the LPA 1976 (no provision stated), were O. 7 and O. 15 r. 16 of RHC and as to the two 'Motion of No Confidence' – Motion 1 and 2. MBC was not being mentioned at
B all, and neither any reference was directed to it anywhere in the originating summons.The stage where MBC was being mentioned was in the oral submission made by Mr P. Suppiah, in which he submitted that – "we are not challenging the act of the MBC. Our complaint here as to MBC is the quick recognition given to the
C group of people which usurp the power – which the MBC should not do. They had no power to recognise this new group". Could that form of 'quick action' be treated as a decision derived by MBC. Also, in the affidavit in support for the striking out process, it is stated that after the Johore Bar Committee did not cooperate
D with the requisitionists, the assistance of the Bar Council was sought to circulate the notice of EGM and the motion. The gist of this originating summons hence revolves on the issue of the plaintiff being removed as the Chairman of the Johore State Bar, said pursuant to an illegal resolution. And as being correctly
E pointed out by the plaintiff, he is not challenging any Public Authority here. What was being challenged was on the resolution passed at the EGM on 26 November 2010 which led to his removal. Unlike *Ahmad Jefri*'s case, where the sacking was done by a Public Authority – thus the element of Public Law comes
F into play and therefore the remedies must be sought under O. 53 – here, since there is no challenge being made to any Public Authority, there exists no element of public law at all. There exists no judicial control of any administrative action here.

G **[12]** I fully agree with the plaintiff's submission and would quote a passage from the White Book 1997 at p. 855, whereby it is stated ... "Judicial Review now lies against an inferior court or tribunal, and against any persons or bodies which perform public duties or functions. Judicial Review will not lie against a person or
H body carrying out private law and not Public Law functions". The 1st defendant, the 2nd to the 10th defendants and the 11th to the 14th defendant are individuals and private persons. No public personnel nor any public laws nor Public Authority are involved in the present originating summons. Both the plaintiff and defendants
I are governed by the LPA. The decision to remove the plaintiff and

his previous committee was done by way of a resolution – a common practice in any Society or Association, where an expelled member may bring an action against the Committee Members of the Association for his restoration. In fact, in the case of *Majlis Peguam Malaysia & Ors. v. Raja Segaran a/l Krishnan* [2005] 1 MLJ 15, it was said that ss. 56 and 57 of the LPA (which deal with the powers of the Bar Council) are to the Bar Council what a Memorandum of Association is to a limited company.

[13] Hence, premised on the above reasoning, I hereby rule that the preliminary objections raised by the defendants at this juncture ought to be overruled. The plaintiff's originating summons do remain and matters could be adjudicated further. I order no cost here.